90-1176

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

BRIAN BERNASCO,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

ROLAND W. BURRIS
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General
State of Illinois

TERENCE M. MADSEN
NATHAN P. MADDOX*
Assistant Attorneys General
500 South Second Street
Springfield, IL 62706
(217) 782-9054

Attorneys for Petitioner

*Counsel of Record

QUESTION PRESENTED FOR REVIEW

I. Whether a defendant's confession can be suppressed as having been obtained in violation of the defendant's right to due process of law, where the confession was voluntarily given, proper *Miranda* warnings were given prior to the confession, the police officer's questioning defendant had no reason to believe defendant's waiver of rights under *Miranda* was anything other than knowing and intelligent and there was no police misconduct or overreaching causally related to defendant's inability to make a knowing and intelligent waiver of rights under *Miranda*.

PARTIES TO THE ACTION

Brian Bernasco, respondent, was defendant in the Circuit Court of Madison County, Illinois, appellee in the Appellate Court of Illinois and appellee in the Supreme Court of Illinois.

The People of the State of Illinois, petitioner, were plaintiff in the Circuit Court of Madison County, Illinois, appellant in the Appellate Court of Illinois and appellant in the Supreme Court of Illinois.

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OPINIONS IN THE CASE

People v. Bernasco, 138 Ill.2d 349, 562 N.E.2d 958 (1990) (Appendix A);

People v. Bernasco, 185 Ill.App.3d 480, 541 N.E.2d 774 (5th Dist. 1989) (Appendix B).

JURISDICTIONAL GROUNDS

The Illinois Supreme Court's opinion sought to be reviewed is dated October 18, 1990. No motions for rehearing or extension have been filed. This Court has jurisdiction to review the judgment of the Illinois Supreme Court conferred by 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V

> . . . nor shall be compelled in any criminal case to be a witness against himself . . . .

Constitution of the United States, Amendment XIV

> . . . nor shall any State deprive any person of life, liberty, or property, without due process. . . .

STATEMENT OF THE CASE

This cause concerns a petition for writ of certiorari to the Supreme Court of Illinois, seeking review of that court's opinion in *People v. Bernasco*, 138 Ill.2d 349, 562 N.E.2d 958 (1990). In *Bernasco*, the Illinois Supreme Court upheld decisions of the trial court and Illinois Appellate Court suppressing a confession made by respondent, Brian Bernasco (referred to herein as defendant).

On December 30, 1986, the juvenile officer of the Collinsville police department told the defendant's father that he wanted to talk to the defendant at the station. When the defendant and his father arrived at the police station the juvenile officer told them that a detective would do the questioning. According to the testimony of the defendant's father, Detective Zukosky appeared and stated: "You can come in now." The defendant's father said that he then got up to go in with the defendant, but was told by the detective, "[N]o, you sit and wait here." Detective Zukosky, however, testified that he did not recall the father wanting to accompany the defendant nor did he tell the father that he could not do so.

Detective Zukosky took the defendant to the detective's office located in the basement of the Collinsville police station. The defendant, who was 17 years old and had never been arrested or interrogated by the police, testified that he was scared when he was taken downstairs. Officer Borkowski joined the defendant and Detective Zukosky in the detective's office. The door to the office was left open. The defendant was given a copy of his *Miranda* rights and Officer Borkowski testified that he read each section to the defendant, who then initialed each section. The defendant was asked if he had any questions about his rights, and if he understood them, and he acknowledged that he did understand them. The defendant then signed a waiver of rights form which was witnessed by Officer Borkowski and Detective Zukosky.

Officer Borkowski then read the defendant his rights as printed on the "voluntary statement forms" used to take the defendant's statement. The defendant then gave an oral statement in which he admitted his involvement in several burglaries, and Officer Borkowski reduced the statement to writing at the defendant's request. The defendant was then given the statement to read, and Detective Zukosky testified that he read it aloud. The defendant then initialed the scratch mark that Borkowski had made and signed the voluntary statement. Detective Zukosky testified that there was nothing in the defendant's demeanor or his answers to questions that would indicate that he did not understand what his rights were. He stated that the defendant did not seem to have any trouble grasping the questions he was asked, and that he answered in a normal manner, giving logical answers. No threats or promises were made to the defendant and he

did not appear to be intoxicated or under the influence of any drugs.

On cross-examination, Detective Zukosky testified that he did not know if the defendant was in school or what level of education the defendant had attained. Zukosky also agreed that he did not know anything about the defendant's reading ability, comprehension ability, or IQ. Detective Zukosky also stated that he did not know if someone with a fourth-grade reading and comprehension level could understand legal terms. Officer Borkowski similarly acknowledged that he was not familiar with the defendant's academic credentials or his reading ability.

Don Mattingly, a school psychologist employed by the Parando Special Education District in Red Bud, testified for the defendant at the suppression hearing. Mattingly has a bachelor's and a master's degree in psychology from Eastern Illinois University and had spent the last 12 years working as a school psychologist. Mattingly evaluated the defendant in March of 1986, approximately nine months prior to the defendant's interrogation, to determine whether he was qualified for special education services. After evaluating the defendant, who was attending regular classes at the time, Mattingly concluded that the defendant did not qualify for the Collinsville special education programs. Mattingly also concluded that the defendant had a full scale IQ of 80, and he stated that the 80 to 89 range is referred to as the slow learner or low average range. Mattingly also determined that the defendant's reading skills were at the beginning to middle fourth-grade level.

The psychologist testified that when the two police officers interviewed the defendant in the police station, the defendant would have found the circumstances intimidating. On cross-examination, however, Mattingly also indicated that anyone, regardless of educational background, who was being interrogated by two police officers would find the circumstances intimidating. In such a situation, Mattingly stated that the defendant would probably agree "to most everything that was said to him to get himself out of the situation."

Mattingly further stated that in his opinion defendant did not have the ability to understand legal terms. He agreed that it was unlikely that the defendant could understand words like "interrogate," "court-appointed attorney," "intimidation," "immunity," or "waiver." He also testified, however, that the defendant probably had an idea what a lawyer is, and would likely understand the phrases "I do not have to talk with any Collinsville police officer, unless I want to" and "I know I can refuse to answer any questions."

The defendant's father, Carl Bernasco, testified that the defendant dropped out of school in the ninth grade and had never before been arrested or interrogated by the police. Mr. Bernasco testified that the only reason he did not go with his son when he was being questioned by the police was because Detective Zukosky told him that he could not.

The defendant, Brian Bernasco, also testified at the suppression hearing. He stated that the officer handed him a copy of the *Miranda* waiver and read it to the defendant at a normal pace. The defendant admitted that

he initialed and signed the waiver of rights forms, but stated that he was not paying attention, was scared, and did not understand what the waiver meant. The defendant also denied that the officer asked him if he understood his rights after each section of the *Miranda* waiver was read to him. Instead, the defendant stated that the officer told him to initial each paragraph, and then when he finished reading the entire document, he was asked if he understood his rights. The defendant admitted that he told the officer that he understood his rights when he was asked.

The defendant also admitted initialing the *Miranda* rights waiver at the top of the voluntary statement form but denied that Detective Zukosky readvised him of his rights. After signing the waiver forms, the defendant was asked to tell everything he knew. The defendant gave his statement and Detective Zukosky wrote it down. The defendant admitted that the information contained in the written statement came from him and that he read it over, but stated that he did not read it out loud. The defendant admitted signing the voluntary statement forms, but said that he did not understand at the time of the questioning that he had a right to refuse to speak to the police and had a right to leave when he wanted. *People v. Bernasco*, 185 Ill.App.3d 480, 482-485, 541 N.E.2d 774, 775-776 (5th Dist. 1989).

Based upon the above evidence, the trial court granted defendant's motion to suppress the confession. In doing so, the trial court found that defendant's confession was not voluntary and that the confession was a product of his sub-normal intelligence, his inability to comprehend his rights and his fright of the situation.

The trial court further stated that it was not suggesting in its findings that the Collinsville police, in any way, overreached or threatened or coerced defendant into giving his statement. *Bernasco,* 185 Ill.App.3d at 485-486, 541 N.E.2d 777-778 (trial court order reproduced in appellate court opinion). The State appealed the order suppressing the confession to the Illinois Appellate Court. That court reversed the trial court's finding that defendant's statement was involuntary, citing this Court's decision in *Colorado v. Connelly,* 479 U.S. 157 (1986), for the proposition that police coercion is a necessary predicate of such a finding. However, the appellate court affirmed the suppression of the confession based upon the trial court's finding that defendant did not knowingly waive his *Miranda* rights. *Bernasco,* 185 Ill.App.3d at 492-494, 541 N.E.2d at 781-782. In this opinion, the appellate court noted that a state constitution can give broader rights than the Federal Constitution, but then specifically stated that it need not decide in this case whether the Illinois Constitution gives broader protection than the Federal Constitution to defendants such as this defendant. *Bernasco,* 185 Ill.App.3d at 490, 541 N.E.2d at 780.

Following the appellate court decision, the State appealed to the Illinois Supreme Court. That court affirmed the appellate court decision. *People v. Bernasco,* 138 Ill.2d 349, 562 N.E.2d 958 (1990). The Illinois Supreme Court expressly based its opinion on Federal Constitutional law, though, in dicta, it stated that had either of the parties raised the question as a matter of state law it would have ruled the same way. *Bernasco,* 138 Ill.2d at 365-366, 562 N.E.2d at 965. Without questioning the factual finding that no police misconduct was involved in

obtaining defendant's confession, the court upheld suppression of the confession because defendant had not knowingly and intelligently waived his rights under *Miranda*.

ARGUMENT

A DEFENDANT'S CONFESSION CANNOT BE SUPPRESSED AS HAVING BEEN OBTAINED IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW, WHERE THE CONFESSION WAS VOLUNTARILY GIVEN, PROPER *MIRANDA* WARNINGS WERE GIVEN PRIOR TO THE CONFESSION, THE POLICE OFFICER'S QUESTIONING DEFENDANT HAD NO REASON TO BELIEVE DEFENDANT'S WAIVER OF RIGHTS UNDER *MIRANDA* WAS ANYTHING OTHER THAN KNOWING AND INTELLIGENT AND THERE WAS NO POLICE MISCONDUCT OR OVERREACHING CAUSALLY RELATED TO DEFENDANT'S INABILITY TO MAKE A KNOWING AND INTELLIGENT WAIVER OF RIGHTS UNDER *MIRANDA*.

In *Colorado v. Connelly*, 479 U.S. 157 (1986), this Court reviewed a decision of the Colorado Supreme Court which had suppressed a confession as a violation of due process (U.S. Const., Amend. XIV) because the defendant had involuntarily waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), even though the involuntary nature of the waiver was not related to police misconduct. In reversing the Colorado Supreme Court's decision, this Court stated: "[a]bsent police misconduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." 479 U.S. at 164. In the instant case, the Illinois Supreme Court held that a confession must be suppressed as a violation of due

process because the confession was made without a knowing and intelligent waiver of rights under *Miranda*, even though the defendant's inability to make a knowing and intelligent waiver of rights was not related to police misconduct. As in *Connelly*, this Court should grant certiorari and reverse the Illinois Supreme Court's decision because absent police misconduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.

Respondent, Brian Bernasco (hereinafter referred to as defendant), was brought to the Collinsville, Illinois Police Department by his father, at the request of the police. At the station, defendant was questioned by two police officers concerning several burglaries and he subsequently made an oral confession and signed a written confession admitting his involvement in the burglaries. Prior to the questioning, defendant was given a copy of his *Miranda* rights, each section of the form containing the *Miranda* rights was read to defendant, and defendant initialed each section. Defendant stated that he understood those rights and he signed a waiver of rights form. Defendant was again read his rights on a voluntary statement form used by the police department. Defendant's statement was reduced to writing on the form and he signed the statement. The police testified that there was nothing in defendant's demeanor or his answers to questions that would indicate that he did not understand what his rights were. Defendant did not seem to have trouble grasping the questions and he answered in a normal manner, giving logical answers. No threats or promises were made to defendant and he did not seem to

be intoxicated or under the influence of drugs. *People v. Bernasco*, 185 Ill.App.3d 480, 481-482, 541 N.E.2d 774, 775 (5th Dist. 1989). In its order suppressing the confession, the trial court stated: "The Court is not suggesting in these findings that the Collinsville Detectives, in any way, overreached or threatened or coerced the Defendant into giving his statement in this case[.]" *Id.*, 185 Ill.App.3d at 486, 541 N.E.2d at 777.

While there is no evidence of police misconduct or overreaching in this case, nor any evidence that the police were aware of any difficulty defendant may have had in knowingly and intelligently waiving his *Miranda* rights, there was testimony concerning defendant's ability in this regard. This evidence showed that defendant, who was 17 years old at the time of the questioning, had dropped out of school in the ninth grade and read and comprehended at a fourth grade level. Defendant also had an IQ of 80, with the 80-89 range referred to as the slow learner or low average range. *Id.*, 185 Ill.App.3d at 483-484, 541 N.E.2d at 776. Based upon this and other testimony from a school psychologist and testimony from defendant and his father, the trial court found that defendant's confession was the product of his sub-normal intelligence, his inability to comprehend what his rights were, and his fright of the situation. *Id.*, 185 Ill.App.3d at 486, 541 N.E.2d at 777. The trial court's suppression of the confession was affirmed by the Appellate Court of Illinois *Id.*, and, in turn, by the Illinois Supreme Court. *People v. Bernasco*, 138 Ill.2d 349, 562 N.E.2d 958 (1990).

Petitioner contended in the trial court, in the appellate court and in the state supreme court that the evidence in this case was insufficient to establish that

defendant's waiver of rights was not knowingly and intelligently made. However, petitioner does not request this Court to review that aspect of the lower courts' findings. Rather, even accepting that defendant's waiver of rights under *Miranda* was not knowing and intelligent, it is petitioner's contention that the resultant confession cannot be suppressed as a violation of due process where there was no police misconduct related to the defendant's inability to knowingly and intelligently waive his rights. This argument was specifically presented to and rejected by the Illinois Supreme Court. *People v. Bernasco*, 138 Ill.2d at 366, 562 N.E.2d at 965.

In its decision affirming the suppression of the confession, the Illinois Supreme Court noted that pursuant to a pre-*Connelly* decision from this Court a valid waiver of rights under *Miranda* has two components. The waiver must be voluntary and it must be knowingly and intelligently made. *Id.*, 138 Ill.2d at 354, 562 N.E.2d at 960; *citing, Moran v. Burbine*, 475 U.S. 412 (1986). The court then analyzed *Moran* and *Connelly*, as well as post-*Connelly* decisions, to determine whether the knowing and intelligent aspect of the *Miranda* waiver survived *Connelly*, and whether that aspect of the waiver has a constitutional basis.[1] After this analysis the court found that in

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[1] The court's difficulty with this question is not unique. Compare, *United States v. Yunis*, 859 F.2d 953 (D.C.Cir. 1988) (in *Connelly*, the question of whether the defendant confessed knowingly and intelligently was evidently irrelevant, thus, a defendant's knowledge of his rights appears to be wholly subordinate to the appraisal of voluntariness) with *Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1988) (we do not read the

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Connelly this Court did not overrule *Burbine's* requirement that a *Miranda* waiver be intelligent and knowing as well as voluntary: "from a Federal constitutional viewpoint . . . where a defendant confesses after being given *Miranda* warnings . . . both intelligent knowledge and voluntariness remain requirements" for a valid waiver. *Bernasco*, 138 Ill.2d at 357, 562 N.E.2d at 961.

The fatal flaw in the court's analysis is not its finding that both aspects of a valid waiver of rights under *Miranda* survive this Court's *Connelly* opinion. Rather, the flaw is the disparate treatment the court accords to the two aspects of the waiver. The court recognized this Court's holding that state action must be causally related to the involuntary nature of a confession before a violation of due process may be found. Nonetheless, the court suppressed defendant's confession on due process grounds because he had not knowingly and intelligently waived his *Miranda* rights, even though there was no police misconduct (*i.e.* state action) causally related to defendant's inability to intelligently and knowingly waive his rights under *Miranda*. Such a suppression extracts a high price from the criminal justice system and returns to that system nothing at all.

"Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." *United States v.*

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Connelly decision as demonstrating an intent by the Supreme Court to eliminate the distinction between voluntariness and knowing waivers).

Janis, 428 U.S. 433, 448-449 (1976). "The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." *Connelly*, 479 U.S. at 166. Exclusion of the confession in this case imposes the substantial cost of the exclusionary rule, yet it will not serve to deter future violations of the Constitution because no individual involved in this case, particularly no agent of the state, committed any act of omission or commission which can be identified as having been a violation of defendant's constitutional rights.

Petitioner does not contend that a confession may never be suppressed on due process grounds because the defendant's waiver of rights under *Miranda* was not knowingly and intelligently made. Had the police been aware of defendant's inability to knowingly and intelligently waive his rights in the instant case, and had they then "exploited this weakness with coercive tactics" (*Connelly*, 479 U.S. at 165), the confession would likely be subject to suppression. However, absent such police misconduct, a confession should not be suppressed on due process grounds. As this Court stated in *Connelly*: "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. . . . *Miranda* protects defendants against coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." 479 U.S. at 170.

In this case there was no police misconduct, no police overreaching, no "governmental coercion." Nonetheless, on Federal constitutional due process grounds the Illinois Supreme Court upheld the suppression of defendant's confession. While the court stated that it would have

suppressed the confession as a matter of state law, this language forms no basis for the court's decision. As the court stated: "we need not further consider how or whether our own State's common, statutory or constitutional law would bear on the issues before us, because the parties have not raised such questions, and because Federal constitutional principles by themselves are sufficient to inform our present judgment." *Bernasco*, 138 Ill.2d at 365-366, 562 N.E.2d at 965. Therefore, this question is properly before this Court, and this Court should grant certiorari and reverse the decision of the Illinois Supreme Court.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner respectfully requests that this Honorable Court grant certiorari to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General
State of Illinois

TERENCE M. MADSEN
NATHAN P. MADDOX*
Assistant Attorneys General
500 South Second Street
Springfield, IL 62706
(217) 782-9054

Attorneys for Petitioner

* Counsel of Record

(No. 69035.–Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. BRIAN BERNASCO, Appellee.

Opinion filed October 18, 1990.

JUSTICE STAMOS delivered the opinion of the court:

In the circuit court of Madison County, the 17-year-old defendant, Brian Bernasco, was charged by information with two counts of residential burglary (Ill. Rev. Stat. 1985, ch. 38, par. 19–3). That court suppressed his confession, finding that, though the confession was not coerced or otherwise the product of improper police conduct, and though the confession was preceded by *Miranda* warnings (see *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602), defendant's intelligence level was so low that his *Miranda* waiver and his confession were neither voluntary nor knowing.

The appellate court affirmed. (195 Ill. App. 3d 480.) The appellate court held that, even though defendant's *Miranda* waiver and confession were voluntary within the meaning of the fifth and fourteenth amendments (U.S. Const., amends. V, XIV; see *Colorado v. Connelly* (1986), 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515), his *Miranda* waiver was invalid because, as the trial court found, it was not knowing and intelligent (see *Moran v. Burbine* (1986), 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421, 106 S. Ct. 1135, 1141; *People v. Turner* (1973), 56 Ill. 2d 201, 205-07). (185 Ill. App. 3d at 490.) The appellate court acknowledged that in given cases the confessions of subnormally intelligent defendants have been held admissible, but the court observed that the question of intelligent waiver is a

factual one that may depend in part on such circumstances as a defendant's background and conduct. The appellate court concluded that the trial court's finding in the present cause was not against the manifest weight of the evidence. We then allowed the State's petition for leave to appeal (107 Ill. 2d R. 315(a)) and now affirm.

The chief issue is whether a valid *Miranda* waiver must be knowing and intelligent in addition to being free from coercion or other misconduct. The secondary issue is whether the trial court's finding, that defendant did not knowingly and intelligently waive his *Miranda* rights or confess, was in accord with the manifest weight of the evidence.

The facts of this cause were fully set forth in the appellate court's opinion. We will refer to them as necessary. Briefly, defendant was of subnormal intelligence and was questioned by police outside his father's presence and on the assumption that he could understand *Miranda* warnings. At trial, his father testified that defendant had left school in the ninth grade and had had no prior police experience. A psychologist testified that defendant could not understand certain *Miranda* terminology and that he would probably have agreed to almost anything said to him if doing so would end his interrogation. Defendant testified that he had not been paying attention to his *Miranda* waiver form, had not understood it, and had been scared.

I

The State contends that, in *Colorado v. Connelly* (1986), 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515, the Supreme

Court decisively rejected the theory on which the appellate court relied and for which defendant argues: that a *Miranda* waiver and resulting confession must be knowing and intelligent as well as constitutionally "voluntary" in order to be admissible. In turn, the appellate court and defendant rest their view on *Moran v. Burbine* (1986), 475 U.S. 412, 89 L. Ed. 2d 410, 106 S. Ct. 1135. We hold that the State's contention is not supported by *Connelly* and that *Burine's* requirement of intelligent knowledge as well as of voluntariness continues to be the law.

Connelly involved a defendant who, while mentally ill, had confessed to a murder. He had first confessed spontaneously upon approaching a police officer in the street. He had then confessed twice more after being given *Miranda* warnings. No improper police coercion had accompanied his confessions.

The Colorado Supreme Court held that, as a matter of due process, voluntariness required that the first, spontaneous confession have been "the product of a rational intellect and a free will," regardless of whether there had been improper coercion; that, despite any lack of official coercive origin, the confession's very admission into evidence would have constituted State action implicating the fourteenth amendment's due process clause; and that, because of evidence that the defendant had been suffering from a serious mental disorder, the trial court correctly found that he had lacked a rational intellect and free will and that the confession had thus been involuntary. (*People v. Connelly* (Colo. 1985), 702 P.2d 722, 728-29.) As for the subsequent confessions, the Colorado Supreme Court likewise held that, because of the evidence of the defendant's mental condition, the trial court correctly

concluded that the State had failed to prove clearly and convincingly that the defendant's attempted waivers of *Miranda* rights were free and intelligent so as to be voluntary and thus effective. *People v. Connelly*, 702 P.2d at 729.

On review, the United States Supreme Court held that, in order to satisfy the fourteenth amendment's due process requirements as to voluntariness, it is sufficient that a confession not be causally related to coercive police conduct. (*Colorado v. Connelly*, 479 U.S. at 167, 93 L. Ed. 2d at 484, 107 S. Ct. at 522.) The Court rejected any conclusion that, "by itself and apart from its relation to official coercion," a defendant's mental condition might determine constitutional voluntariness. (*Connelly*, 479 U.S. at 164, 93 L. Ed. 2d at 482, 107 S. Ct. at 520.) Accordingly, any voluntariness inquiries into a confessing defendant's state of mind, "inquiries quite divorced from any coercion brought to bear on the defendant by the State," should be left for resolution by State evidence rules pertaining to reliability; such matters are not governed by the fourteenth amendment's due process clause. *Connelly*, 479 U.S. at 166-67, 93 L. Ed. 2d at 484, 107 S. Ct. at 522.

The *Connelly* Court explained that it was reversing the Colorado judgment in its entirety because the Court believed that the judgment's underlying analysis had been influenced by an erroneous view of constitutional voluntariness requirements. However, the Court explicitly noted that, on remand, the Colorado court could reconsider other issues not inconsistent with the Federal opinion (*Connelly*, 479 U.S. at 171 n.4, 93 L. Ed. 2d at 487 n.4, 107 S. Ct. at 524 n.4) – issues that apparently could

include the separate question whether defendant's *Miranda* waivers had been intelligent and knowing (see *Connelly*, 479 U.S. at 184 n.5, 93 L. Ed. 2d at 495 n.5, 107 S. Ct. at 531 n.5 (Brennan, J., joined by Marshall, J., dissenting)).

Though it is clear from the *Connelly* majority opinion and the cited dissent that a confession, made after a *Miranda* waiver, might still be suppressed on grounds that *Miranda's* protections had not been intelligently and knowingly waived, it is not perfectly clear from the *Connelly* majority opinion whether such suppression would have a constitutional basis. Nevertheless, defendant would ground suppression in the constitutional jurisprudence of *Burbine*, and we agree that *Burbine* has continuing vitality in this regard.

According to *Burbine*, an inquiry into *Miranda* waiver has "two distinct dimensions": (1) whether there was a free, uncoerced choice and (2) whether there was awareness of the right and the consequences of abandoning it. (*Burbine*, 475 U.S. at 421, 89 L. Ed. 2d at 421, 106 S. Ct. at 1141; accord *Colorado v. Spring* (1987), 479 U.S. 564, 573, 93 L. Ed. 2d 954, 965, 107 S. Ct. 851, 857.) A valid *Miranda* waiver would thus require "*both* an uncoerced choice *and* the requisite level of comprehension." (Emphasis added.) (*Burbine*, 475 U.S. at 421, 89 L. Ed. 2d at 421, 106 S. Ct. at 1141.) *Burbine* traced its requirements of voluntariness and intelligent knowledge to *Miranda* itself and beyond. *Burbine*, 475 U.S. at 421, 89 L. Ed. 2d at 420-21, 106 S. Ct. at 1140-41 (" 'provided the waiver is made voluntarily, knowingly and intelligently' "), quoting *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 707, 86 S. Ct. at 1612.

In *Burbine*, the police had failed to inform the respondent that an attorney, whom the respondent's sister had attempted to retain for him, had telephoned the police less than an hour before the respondent's interrogation and had been told by the police that the respondent would not be interrogated until the next day. (*Burbine*, 475 U.S. at 415-17, 89 L. Ed. 2d at 417-18, 106 S. Ct. at 1138-39.) The Court found no doubt about the respondent's "comprehension of the full panoply of [*Miranda*] rights * * * and of the potential consequences of a decision to relinquish them." (*Burbine*, 475 U.S. at 422, 89 L. Ed. 2d at 421, 106 S. Ct. at 1141.) The Court, viewing *Miranda* as establishing protections against the "compulsion inherent in custodial interrogation," reaffirmed that "full comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." (*Burbine*, 475 U.S. at 425, 427, 89 L. Ed. 2d at 423, 424, 106 S. Ct. at 1143, 1144.) The unethical failure to inform the respondent of the attorney's call did not deprive him of "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." (*Burbine*, 475 U.S. at 423-24, 89 L. Ed. 2d at 422, 106 S. Ct. at 1142.) Accordingly, "[b]ecause respondent's voluntary decision to speak was made with full awareness and comprehension of all the information *Miranda* requires the police to convey," his *Miranda* waivers were valid. *Burbine*, 475 U.S. at 424, 89 L. Ed. 2d at 422, 106 S. Ct. at 1142.

In arguable contrast to the twin *Burbine*-recognized requirements of voluntariness and intelligent knowledge for *Miranda* waivers, the *Connelly* Court initially declared

with seeming breadth that admissibility of a confession by a defendant whose mental state interfered with " 'rational intellect' " and " 'free will' " is to be governed by State evidence rules "rather than by our previous decisions regarding coerced confessions and *Miranda* waivers." (*Connelly*, 479 U.S. at 159, 93 L. Ed. 2d at 479, 107 S. Ct. at 518.) *Burbine* was a previous decision regarding *Miranda* waivers, albeit one announced only nine months before.

However, *Connelly* merely means that, in general, issues of intelligent knowledge are separate from issues of voluntariness. The *Connelly* opinion was actually addressing (1) an initial confession given under circumstances requiring no *Miranda* warning (hence involving no question of waiver), the voluntariness of the confession being at issue, and (2) subsequent confessions given after *Miranda* warnings, the voluntariness of the *Miranda* waivers being at issue. Thus – in a narrower vein than that in which the opinion's opening sentences might cursorily be read – the Court continued that, *in determining whether a confession is voluntary* where there has been no official coercion, inquiries into the state of a confessing defendant's mind, when "divorced from any coercion * * * by the State," are to be resolved by State evidence law rather than by the due process clause of the fourteenth amendment. (*Connelly*, 479 U.S. at 166-67, 93 L. Ed. 2d at 484, 107 S. Ct. at 522.) Likewise, *in determining whether a Miranda waiver is voluntary*, a court is to consider the presence or absence of coercion emanating from official sources, not coercion that is of unofficial origin or

that flows merely from a defendant's psychological peculiarities. *Connelly*, 479 U.S. at 170-71, 93 L. Ed. 2d at 486-87, 107 S. Ct. at 523-24.

We observe that at no point did the *Connelly* Court overrule *Burbine's* and other cases' requirement that a *Miranda* waiver be intelligent and knowing as well as voluntary. The *Connelly* opinion analyzed merely the constitutional voluntariness component of a confession's admissibility and of a waiver's validity. *Connelly*, 479 U.S. at 167, 170, 93 L. Ed. 2d at 484, 486, 107 S. Ct. at 522, 523 (citing, *inter alia*, *Burbine*).

Thus, from a Federal constitutional viewpoint, only voluntariness, rather than intelligent knowledge, ordinarily need be shown in the case of a confession (such as the *Connelly* respondent's first one) that is given under circumstances not requiring a *Miranda* warning. But, where a defendant confesses after being given *Miranda* warnings (as in the case of the subsequent *Connelly* confessions), both intelligent knowledge and voluntariness remain requirements for assuring that a defendant's *Miranda* waiver reflects *Miranda's* "carefully drawn approach": its "subtle balance" between the need for police questioning and the coercive pressures inherent in such questioning. See *Burbine*, 475 U.S. at 426-27, 89 L. Ed. 2d at 424, 106 S. Ct. at 1143-44.

This understanding of *Connelly* and *Burbine* has been confirmed by later decisions. (See *Colorado v. Spring* (1987), 479 U.S. 564, 572, 93 L. Ed. 2d 954, 965, 107 S. Ct. 851, 857 (*Miranda* waiver must be made " 'voluntarily, knowingly and intelligently' "); *cf. Illinois v. Perkins* (1990), 495 U.S. ___, 110 L. Ed. 2d 243, 110 S. Ct. 2394

(where murder confession was obtained deceptively by undercover "cellmate" prior to any need for *Miranda* warning on murder charge, and thus no *Miranda* waiver question existed, sole self-incrimination issue was voluntariness in sense of absence of coercion; intelligent knowledge not issue where no Miranda waiver question presented); *Michigan v. Harvey* (1990), 494 U.S. ___, ___, 108 L. Ed. 2d 293, 301, 110 S. Ct. 1176, 1179 (waiver of right of counsel under sixth amendment must be voluntary, knowing, and intelligent; equivalent of *Miranda* warnings generally suffices to establish knowing and intelligent waiver of sixth amendment right during post-indictment questioning); *Patterson v. Illinois* (1988), 487 U.S. 285, 292 & n.4, 101 L. Ed. 2d 261, 272 & n.4, 108 S. Ct. 2389, 2394 & n.4 (whether *Miranda* waiver also waived right to counsel under sixth amendment during subsequent post-indictment questioning depended on whether *Miranda* waiver was both voluntary and "knowing and intelligent").) Commentators support this understanding. See Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 Wash. U.L.Q. 59, 143-47 & n.383 (1989) (criticizing perceived retreat from *Miranda* but implicitly recognizing that *Connelly* left intelligent-knowledge waiver requirement intact); Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. Pitt. L. Rev. 1007, 1018-19, 1042-54 (1988) (intelligent knowledge remains separate *Miranda* waiver requirement in addition to voluntariness); Note, *Constitutional Protection of Confessions Made by Mentally Retarded Defendants*, 14 Am. J.L. Med. 431,

433-36, 448-58 (1989) (probably after *Connelly*, but certainly after *Patterson*, intelligent knowledge remains separate *Miranda* waiver requirement); Note, *Colorado v. Connelly: The Demise of Free Will as an Independent Basis for Finding a Confession Involuntary*, 33 Vill. L. Rev. 895, 907, 920-22 (1988) (intelligent knowledge is separate requirement).

There remains a world of difference between voluntariness and intelligent knowledge. It has been noted, thought to analytically different effect, that a mentally ill person may "confess" at length quite without external compulsion but not intelligently and knowingly, while a perfectly rational person on the torture rack may confess intelligently and knowingly but without free will. *People v. Kincaid* (1981), 87 Ill. 2d 107, 127-28 (Simon, J., dissenting) (issue on review was solely whether confession was "voluntary"; dissent discussed no distinction between lack of coercion and intelligent knowledge in terms of post-1986 *Burbine-Connelly* constitutional voluntariness doctrine but simply deemed both hypothetical confessions not "voluntary").

However, for Federal constitutional purposes, a distinction does need to be made between two types of awareness in interpreting the *Miranda*-derived waiver requirement of intelligent knowledge.

The first type of awareness involves "know[ing] and understand[ing] every possible consequence of a waiver of the Fifth Amendment privilege" (*Spring*, 479 U.S. at 574, 93 L. Ed. 2d at 966, 107 S. Ct. at 857), being "totally rational and properly motivated" when confessing (*Connelly*, 479 U.S. at 166, 93 L. Ed. 2d at 484, 107 S. Ct. at 521),

or having all information that might be "useful" or that "might * * * affec[t one's] decision to confess" (*Burbine*, 475 U.S. at 422, 89 L. Ed. 2d at 421, 106 S. Ct. at 1141), such as a list of "all the possible subjects of questioning in advance of interrogation" (*Spring*, 479 U.S. at 577, 93 L. Ed. 2d at 968, 107 S. Ct. at 859). In the cited cases, the Supreme Court held that this mental state is not necessary for a valid *Miranda* waiver. The Constitution does not demand "that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights" (*Burbine*, 475 U.S. at 422, 89 L. Ed. 2d at 421, 106 S. Ct. at 1141), and there is no Federal constitutional right to confess only when in possession of information that "could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature" (*Spring*, 479 U.S. at 577, 93 L. Ed. 2d at 967, 107 S. Ct. at 859).

The second type of awareness involves simply being cognizant at all times of "the State's intention to use [one's] statements to secure a conviction" and of the fact that one can "stand mute and request a lawyer." (*Burbine*, 475 U.S. at 422, 89 L. Ed. 2d at 422, 106 S. Ct. at 1141.) The latter mental state is what is held necessary for a valid *Miranda* waiver.

This second type of awareness has been elucidated more recently than *Connelly* and *Burbine* were decided. (See *Patterson v. Illinois* (1988), 487 U.S. 285, 101 L. Ed. 2d 261, 108 S. Ct. 2389.) As noted by the Supreme Court in interchangeably discussing a "knowing and intelligent" waiver of rights to counsel under the fifth and sixth amendments (U.S. Const., amends. V, VI), a waiver must reflect " 'an intentional relinquishment or abandonment

of a known right or privilege' "; "the accused must 'kno[w] what he is doing' so that 'his choice is made with eyes open' "; the accused must have " 'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' " *Patterson*, 487 U.S. at 292, 101 L. Ed. 2d at 272, 108 S. Ct. at 2395.

In satisfying the latter formulation's "constitutional minimum," the *Patterson* Court found it sufficient under the sixth amendment that the petitioner had been aware of two points: (1) he had a right to consult with an attorney, to have an attorney present during questioning, and to have an attorney appointed if he could not afford to retain one privately; and (2) any statement that he made could be used against him in criminal proceedings, and an attorney's presence during questioning could serve him by affording him advice on making any statements. (*Patterson*, 487 U.S. at 293, 101 L. Ed. 2d at 273, 108 S. Ct. at 2395.) Though *Patterson*'s waiver claim arose under the sixth amendment rather than the fifth, the Court noted that the awareness just described resembled the level of awareness found necessary in *Burbine*, adding that, for purposes of post-indictment questioning such as in *Patterson*, there is "a strong similarity between the level of knowledge a defendant must have to waive his Fifth Amendment right to counsel, and the protection accorded to Sixth Amendment rights." (*Patterson*, 487 U.S. at 297, 299 n.12, 101 L. Ed. 2d at 275, 276 n.12, 108 S. Ct. at 2397, 2398 n.12; accord *Michigan v. Harvey* (1990), 494 U.S. ___, ___, 108 L. Ed. 2d 293, 301, 110 S. Ct. 1176, 1179.) It is therefore clear from *Miranda* and its progeny, including

Patterson, that this second type of awareness on a defendant's part is necessary in order to constitute the intelligent knowledge that in turn is required for blunting the coercive effects of police interrogation in a *Miranda* waiver context.

The foregoing review of intelligent-knowledge waiver doctrine is a key to harmonizing *Connelly* with *Burbine*. It also aids in deciding the present cause.

The trial judge in the present cause found that defendant had no prior criminal experience and had a beginning fourth-grade reading and comprehension level that prevented him from "understand[ing] what was happening here and * * * hav[ing] a knowing understanding of what was happening," so that he could not effectively waive his *Miranda* rights "without the aid of his parents or someone who would assist him in translating what was really happening." In other words, as the trial judge found, "because of [defendant's] station in life, because of the circumstances surrounding the situation, he was unable to form a necessary intent to knowingly waive his rights." (The parties agree that defendant's father was not present at defendant's interrogation; the father testified that the police refused him permission to be present, and the trial judge so found.)

The trial judge had heard testimony from a school psychologist that defendant's measured intelligence quotient placed him at the bottom of the slow-learner, low-average range. The psychologist testified that such persons "need to go over things time and time again in order to assimilate the same material than [*sic*] a student who

functions in the normal range of intelligence." The psychologist also testified that defendant probably would not have understood the terms "interrogate," "court-appointed attorney," "intimidation," "immunity," and "waiver" but that he would have agreed "to most everything that was said to him to get himself out of the situation." (The terms "a lawyer appointed for me," "waiver," "immunity," and "intimidated" are contained in a waiver form signed by defendant.)

On cross-examination, the psychologist testified that defendant probably had an idea what a lawyer is, though he would not be able to give a very specific, accurate definition; that defendant understood the terms "silent," "I do not have to talk with any Collinsville Police Officer unless I want to," and "I know that I can refuse to answer any questions," all of which appeared on his waiver form; but that he would have some difficulty with the word "statements" in the form's phrase "stop giving any statements any time." On redirect examination, the psychologist also testified that defendant might be confused by the term "legal rights" and would probably refer to "right" in opposition to "wrong."

In his written order, the trial judge found that, based on his observations of defendant during direct testimony, defendant had substantial difficulty in understanding relatively routine questions, was limited in his comprehension of single words, and was substantially unable to understand relatively simple concepts. The order also recited that the trial judge was convinced from the psychological testimony that defendant would have agreed to and signed almost anything given him during interrogation.

Though the trial judge erred in finding that defendant's confession was not voluntary in the Federal constitutional sense, his findings provide ample support for concluding that defendant's *Miranda* waiver was not knowing and intelligent.

If intelligent knowledge in the *Miranda* context means anything, it means the ability to understand the very words used in the warnings. It need not mean the ability to understand far-reaching legal and strategic effects of waiving one's rights, or to appreciate how widely or deeply an interrogation may probe, or to withstand the influence of stress or fancy; but to waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail. Here, defendant was found not to understand fundamental terms contained in the *Miranda* warnings of his rights, not to have been able to form an intent to waive those rights, and not to have a normal ability to understand questions and concepts. Such findings, if borne out by the evidence, are sufficient to warrant the conclusion that defendant did not waive his *Miranda* rights knowingly and intelligently, and hence to justify suppressing his confession. See Note, *Constitutional Protection of Confessions Made by Mentally Retarded Defendants,* 14 Am. J.L. Med. 431, 432-33, 440-44 (1989) (discussing mentally retarded persons' limited intellectual ability to make knowing and intelligent *Miranda* waivers); *cf.* Holtz, *Miranda in a Juvenile Setting: A Child's Right to Silence,* 78 J. Crim. L. & Criminology 534, 536-37, 546-56 (1987) (citing evidence that most youths lack proper comprehension of rights under police interrogation; proposing use of simplified version of *Miranda*

warnings); Note, *Now My Son, You Are a Man: The Judicial Response to Uncounseled Waivers of Miranda Rights by Juveniles in Pennsylvania*, 92 Dick. L. Rev. 153, 168-71, 175-84 (1987) (discussing factors judicially and scientifically found to bear on waiver competence of arrestees under age 18.).

Our own prior cases lend further weight to today's holding. We have repeatedly analyzed *Miranda* waivers with regard to whether they were *both* voluntary *and* knowing and intelligent. For example, we recently did so in *People v. Reid* (1990), 136 Ill. 2d 27, 51-52, 54-56, a case bearing some factual resemblance to the present one. Though we held there that the trial court's denial of a motion to suppress a confession was not against the manifest weight of the evidence (*Reid*, 136 Ill. 2d at 59-60), we were conscious of our responsibility to show deference to the findings of a trial court that had assessed credibility, demeanor, and the relevant facts – a responsibility we likewise have now, given the trial court's decision to suppress defendant's confession in the present cause. (See *People v. Rogers* (1988), 123 Ill. 2d 487, 495.) The *Reid* result is also distinguishable in that the mother of the 15-year-old subnormally intelligent defendant had been present with him and thus available to explain events to him during his interrogation, even though she was not an attorney. *Reid*, 136 Ill. 2d at 46, 58-59.

Among additional cases in which this court recognized that a *Miranda* waiver must be knowing and intelligent as well as voluntary were *People v. Evans* (1988), 125 Ill. 2d 50, 74; *People v. Rogers*, 123 Ill. 2d at 494-500; *People v. St. Pierre* (1988), 122 Ill. 2d 95, 110-13; *People v.*

Thompkins (1988), 121 Ill. 2d 401, 433-34; *People v. Murphy* (1978), 72 Ill. 2d 421, 437; *People v. Medina* (1978), 71 Ill. 2d 254, 258-59, 263; and *People v. Turner* (1973), 56 Ill. 2d 201, 205-07. See also *People v. Aldridge* (1980), 79 Ill. 2d 87 (presuming that right of counsel under sixth amendment was involved, but analyzing issue in terms of voluntary and knowing waiver following fifth-amendment *Miranda* warnings); *People v. Wipfler* (1977), 68 Ill. 2d 158, 171-72 (treating both non-coercion and intelligent knowledge as components of voluntariness).

Independently of *Miranda* and its Federal voluntariness principles, Illinois courts have long held that, to be admissible, a confession must be "voluntary" in a State-law sense and that a defendant's mental ability, familiarity with the English language, age, education, and experience are among factors to be weighed in determining from the totality of the circumstances whether a confession or waiver of rights is "voluntary" in that sense. (See *People v. Turner*, 56 Ill. 2d at 206; *People v. Hester* (1968), 39 Ill. 2d 489, 497-98; *People v. Cocroft* (1967), 37 Ill. 2d 19, 22; *People v. Earl* (1966), 34 Ill. 2d 11, 15.) (Insanity is treated as a categorical exception; under Illinois law, the confession of an insane person is involuntary *per se*. (*People v. Lambersky* (1951), 410 Ill. 451, 455; *cf.* 33 Vill. L. Rev. at 903-05 (collecting similar State and pre-*Connelly* Federal holdings).)) In their holdings under State law, Illinois courts in effect have treated intelligent knowledge as one component of a confession's overall voluntariness, rather than as an admissibility criterion separate from voluntariness as in *Miranda* waiver law. (See also Ill. Rev. Stat. 1989, ch. 38, par. 114-11 (governing motions to suppress confessions as involuntary).) The line of *Miranda*

cases represented by *Burbine, Connelly, Spring,* and *Patterson* has now seemingly settled, for Federal constitutional purposes, that voluntariness and intelligent knowledge are separate questions; however, for purposes of our own evidence law they are interrelated. Still, at this point we need not further consider how or whether our own State's common, statutory, or constitutional law would bear on the issues before us, because the parties have not raised such questions, and because Federal constitutional principles by themselves are sufficient to inform our present judgment.

In the latter connection, we note the State's argument that Supreme Court cases cited by defendant as supporting a separate admissibility requirement of intelligent knowledge are explainable by whether police misconduct was present of which a defendant was aware. (See *Patterson,* 487 U.S. 285, 101 L. Ed. 2d 261, 108 S. Ct. 2389; *Spring,* 479 U.S. 564, 93 L. Ed. 2d 954, 107 S. Ct. 851; *Burbine,* 475 U.S. 412, 89 L. Ed. 2d 410, 106 S. Ct. 1135; *Smith v. Illinois* (1984), 469 U.S. 91, 83 L. Ed. 2d 488, 105 S. Ct. 490.) The State says that when either there was no such misconduct (*Spring* and *Patterson*) or a defendant was unaware of such misconduct and it had no effect on him (*Burbine*), defendants' statements were found admissible. The State concludes that, since no police misconduct occurred here, the cases cited by defendant support admitting his confession, not suppressing it.

The enunciation of *Miranda* principles in *Patterson, Spring,* and *Burbine,* which we have already discussed, survives the State's attempt to interpret those cases factually. All three cases clearly require that a *Miranda* waiver be both constitutionally voluntary and a decision taken

knowingly and intelligently. In further response to the State's contention, we emulate the tone though not the substance of a separate opinion in *Connelly*, 479 U.S. at 177-78, 93 L. Ed. 2d at 491, 107 S. Ct. at 527-28 (Brennan, J., joined by Marshall J., dissenting):

> While it is true that no police misconduct discernible by a defendant had occurred when statements were held admissible in *Patterson*, *Spring*, and *Burbine*, it is also true that in those cases the Court explicitly and at least as significantly recognized that the statements followed knowing and intelligent waivers of rights. See *Patterson*, 487 U.S. at 292, 300, 101 L. Ed. 2d at 272, 277, 108 S. Ct. at 2394, 2399 ("the specific issue posed here is whether [defendant's] waiver was a 'knowing and intelligent' waiver"; "Because we believe that [defendant's] waiver * * * was 'knowing and intelligent,' we find no error"); *Spring*, 479 U.S. at 573-75, 93 L. Ed. 2d at 965-66, 107 S. Ct. at 857-58 (no allegation of coercion; no allegation that defendant failed to understand that he could remain silent and that anything said could be used against him; waiver was "indisputably" made "knowingly and intelligently"); *Burbine*, 475 U.S. at 421-24, 89 L. Ed. 2d at 421-22, 106 S. Ct. at 1141-42 (voluntariness of waiver not at issue; no question about comprehension of rights; police misconduct in failing to tell defendant about attorney's telephone call could not have affected his intelligence and voluntariness in waiving *Miranda* rights).
>
> The fact that defendants in *Patterson*, *Spring*, *Burbine*, and the present case were all conscious of no police misconduct signifies only that, in regard to whether the intelligent-knowledge *Miranda* waiver element existed, this would be a case of first impression. Arguably unlike

the present defendant, the defendants in the cited cases understood their *Miranda* waivers and the effects of their statements. Whether defendant knowingly and intelligently waived his *Miranda* rights and gave his confession remains the key factual question here.

II

We now turn to the question whether the manifest weight of the evidence contradicts the trial court's finding that defendant did not waive his *Miranda* rights or give his confession knowingly and intelligently.

We do not sit to reweigh the evidence as if we were a trial court; a reviewing court will not disturb a trial court's determination on a motion to suppress evidence unless it is against the manifest weight of the evidence. (*People v. Galvin* (1989), 127 Ill. 2d 153, 162.) Whether a defendant intelligently waived his right to counsel depends, in each case, on the particular facts and circumstances of that case, including the defendant's background, experience, and conduct. (*People v. Turner* (1973), 56 Ill. 2d 201, 205-06.) The trial court here reached its conclusion after hearing police, parental, and psychological testimony and – what is very significant – making its own observations of defendant while he was testifying.

The State argues that defendant could read his confession aloud and that he told the police and they believed that he understood his rights. The State further argues that defendant understood that he did not have to speak with police and that he understood what a lawyer was. The State cites numerous cases, most of them noted in the appellate court's opinion (185 Ill. App. 3d at 495),

in which the confessions of defendants with low intelligence and little education have been held admissible. The majority of the cases cited by the State can easily be distinguished on the facts of the defendants' backgrounds and trials. In any event, as the appellate court wrote, "[t]hese decisions can offer little support for the State's position * * * since the validity of a waiver of rights is essentially a question of fact." (185 Ill. App. 3d at 495.) The State has not persuasively demonstrated that the trial court manifestly erred when it found, based on the facts and circumstances of this cause, that defendant did not knowingly and intelligently waive his *Miranda* rights or give his confession.

For the foregoing reasons, the judgment of the appellate court is affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant, v.
BRIAN BERNASCO, Defendant-Appellee.

Fifth District No. 5-87-0344

Judgment affirmed.

Opinion filed June 27, 1989.

JUSTICE CHAPMAN delivered the opinion of the court:

This is an appeal by the State from an order of the trial court suppressing the confession of the defendant, Brian Bernasco, as involuntary. On December 30, 1986, the juvenile officer of the Collinsville police department told the defendant's father that he wanted to talk to the defendant at the station. When the defendant and his father arrived at the police station the juvenile officer told them that a detective would do the questioning. According to the testimony of the defendant's father, Detective Zukosky appeared and stated: "You can come in now." The defendant's father said that he then got up to go in with the defendant, but was told by the detective, "[N]o, you sit and wait here." Detective Zukosky, however, testified that he did not recall the father wanting to accompany the defendant nor did he tell the father that he could not do so.

Detective Zukosky took the defendant to the detective's office located in the basement of the Collinsville police station. The defendant, who was 17 years old and had never been arrested or interrogated by the police, testified that he was scared when he was taken downstairs. Officer Borkowski joined the defendant and Detective Zukosky in the detective's office. The door to the

office was left open. The defendant was given a copy of his *Miranda* rights and Officer Borkowski testified that he read each section to the defendant, who then initialled each section. The defendant was asked if he had any questions about his rights, and if he understood them, and he acknowledged that he did understand them. The defendant then signed a waiver of rights form which was witnessed by Officer Borkowski and Detective Zukosky.

Officer Borkowski then read the defendant his rights as printed on the "voluntary statement forms" used to take the defendant's statement. The defendant then gave an oral statement in which he admitted his involvement in several burglaries, and Officer Borkowski reduced the statement to writing at the defendant's request. The defendant was then given the statement to read, and Detective Zukosky testified that he read it aloud. The defendant then initialled the scratch mark that Borkowski had made and signed the voluntary statement. Detective Zukosky testified that there was nothing in the defendant's demeanor or his answers to questions that would indicate that he did not understand what his rights were. He stated that the defendant did not seem to have any trouble grasping the questions he was asked, and that he answered in a normal manner, giving logical answers. No threats or promises were made to the defendant and he did not appear to be intoxicated or under the influence of any drugs.

On cross-examination, Detective Zukosky testified that he did not know if the defendant was in school or what level of education the defendant had attained. Zukosky also agreed that he did not know anything about the defendant's reading ability, comprehension

ability, or IQ. Detective Zukosky also stated that he did not know if someone with a fourth-grade reading and comprehension level could understand legal terms. Officer Borkowski similarly acknowledged that he was not familiar with the defendant's academic credentials or his reading ability.

Don Mattingly, a school psychologist employed by the Parando Special Education District in Red Bud, testified for the defendant at the suppression hearing. Mattingly has a bachelor's and a master's degree in psychology from Eastern Illinois University and has spent the last 12 years working as a school psychologist. Mattingly evaluated the defendant in March of 1986, approximately nine months prior to the defendant's interrogation, to determine whether he was qualified for special education services. After evaluating the defendant, who was attending regular classes at the time, Mattingly concluded that the defendant did not qualify for the Collinsville special education programs. Mattingly also concluded that the defendant had a full scale IQ of 80, and he stated that the 80 to 89 range is referred to as the slow learner or low average range. Mattingly also determined that the defendant's reading skills were at the beginning to middle fourth-grade level.

The psychologist testified that when the two police officers interviewed the defendant in the police station, the defendant would have found the circumstances intimidating. On cross-examination, however, Mattingly also indicated that anyone, regardless of educational background, who was being interrogated by two police officers would find the circumstances intimidating. In such a situation, Mattingly stated that the defendant would

probably agree "to most everything that was said to him to get himself out of the situation."

Mattingly further stated that in his opinion defendant did not have the ability to understand legal terms. He agreed that it was unlikely that the defendant could understand words like "interrogate," "court-appointed attorney," "intimidation," "immunity," or "waiver." He also testified, however, that the defendant probably had an idea what a lawyer is, and would likely understand the phrases "I do not have to talk with any Collinsville police officer, unless I want to" and "I know I can refuse to answer any questions."

The defendant's father, Carl Bernasco, testified that the defendant dropped out of school in the ninth grade and had never before been arrested or interrogated by the police. Mr. Bernasco testified that the only reason he did not go with his son when he was being questioned by the police was because Detective Zukosky told him that he could not.

The defendant, Brian Bernasco, also testified at the suppression hearing. He stated that the officer handed him a copy of the *Miranda* waiver and read it to the defendant at a normal pace. The defendant admitted that he initialled and signed the waiver of rights forms, but stated that he was not paying attention, was scared, and did not understand what the waiver meant. The defendant also denied that the officer asked him if he understood his rights after each section of the *Miranda* waiver was read to him. Instead, the defendant stated that the officer told him to initial each paragraph, and then when he finished reading the entire document, he was asked if

he understood his rights. The defendant admitted that he told the officer that he understood his rights when he was asked.

The defendant also admitted initialing the *Miranda* rights waiver at the top of the voluntary statement form but denied that Detective Zukosky readvised him of his rights. After signing the waiver forms, the defendant was asked to tell everything he knew. The defendant gave his statement and Detective Zukosky wrote it down. The defendant admitted that the information contained in the written statement came from him and that he read it over, but stated that he did not read it out loud. The defendant admitted signing the voluntary statement forms, but said that he did not understand at the time of the questioning that he had a right to refuse to speak to the police and had a right to leave when he wanted.

The court found that the defendant did not knowingly and voluntarily waive his right to remain silent. The court stated that it did not find that the Collinsville police department did anything inappropriate or threatened or harassed the defendant in any way. The court nevertheless suppressed the defendant's statement because:

> "Based upon the *Berry* case [*People v. Berry* (1984), 123 Ill. App. 3d 1042, 463 N.E. 2d 1044] I do not believe that this Defendant, who had no prior criminal experience and who reads at a beginning fourth-grade level and who, more importantly, comprehends at a fourth-grade level, could affectively [*sic*] under those circumstances, without the aid of his parents or someone who would assist him in translating what was really happening, I don't believe he voluntarily waived his rights, even though there is no question that he did sign the Wavier [sic] of

> Rights Form, and there is no question that he did so without being forced to do so by anyone."

In its written order the court, after finding that the defendant had an IQ of 80, a fourth-grade reading and comprehension level, and no prior criminal experience, further found:

> "4. That the Statement, which is sought to be suppressed, was written totally by the police officer, who was doing the interrogating and only signed by the Defendant, Brian Bernasco.
>
> 5. That the police officers in this case, namely Detectives Zukosky and Borkowski, were of the opinion that the Defendant, Brian Bernasco, understood his constitutional rights prior to giving a Statement in this case. Further, the police officers, quite properly, had Brian Bernasco initial his *Miranda* Waiver Form and to sign it with them witnessing it. Further, the police officers did not inquire into Brian's background and, instead, relied solely upon him indicating that he understood his 'rights.'
>
> 6. That the school psychologist, who had personally tested Brian Bernasco, testified in the case and testified that there were numerous words contained in the *Miranda* Waiver, which Brian in his opinion would be incapable of understanding because of his limited comprehension and reading skills. The psychologist further testified that his ability to understand those words, while limited, could be enhanced by someone explaining them to him, but the testimony of the police officers clearly indicated that no one explained what the terminology within the *Miranda* Waiver meant.
>
> 7. That the Father of Brian Bernasco took Brian to the police station and requested an

opportunity to be with Brian during the interrogation, and that opportunity was refused.

8. That the direct testimony of Brian Bernasco indicated to the Court, in its observations of the Defendant, that the Defendant had substantial difficulty in understanding relatively routine questions. The Court further observed, from the testimony of Brian Bernasco, that the Defendant was not only limited in his comprehension of single words but, further, was substantially unable to understand relatively simple concepts. That it is the Court's opinion that Brian Bernasco was barely a 17 year old adolescent with sub-normal intelligence, with little education, dependent fully upon his parents, and lacking in experience in criminal affairs completely.

9. That the Court, when confronted with such a situation, feels that it is the obligation of the Court to make sure that the greatest of care was taken to assure that the Confession was voluntary and, further, that the Confession was not a product of ignorance of rights or of adolescent fantasy, fright or despair. (*In re Gault* and *People v. Simmons*).

10. That the Court is not suggesting in these findings the Collinsville Detectives, in any way, overreached or threatened or coerced the Defendant into giving his Statement in this case; rather, the Court feels that the facts indicate, clearly, that the Confession was not voluntary; and that the Confession was the product of Brian's sub-normal intelligence, his inability to comprehend what his rights were and his fright of the situation.

11. That the Court is convinced from the testimony of the psychologist, who had no vested interest in this case, whatsoever, that Brian Bernasco would have agreed to and

> signed most anything placed in front of him during the interrogation process."

The State now appeals, arguing that: (1) since the trial court found that the Collinsville police officers did not coerce the defendant's confession, the confession is admissible against the defendant; (2) the court's decision was against the manifest weight of the evidence; and (3) the court applied the wrong standard to determine whether the defendant's confession was voluntary.

The State initially contends that absent a finding that the police engaged in some coercive activity, the confession must be deemed voluntary, citing *Colorado v. Connelly* (1986), 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515. In *Connelly*, a defendant told a Denver police officer that he had murdered someone and wanted to talk about it. Both that officer and a detective who arrived shortly thereafter advised the defendant of his *Miranda* rights. The defendant was then taken to police headquarters where he detailed his story to the police and subsequently pointed out the location of the murder. The next day the defendant became visibly disoriented and was sent to a State hospital for evaluation. At a subsequent suppression hearing, a psychiatrist testified that the defendant was suffering from chronic schizophrenia and was in a psychotic state on the day he confessed. The psychiatrist further testified that the defendant was experiencing "command hallucinations" which interfered with his ability to make free and rational choices. The psychiatrist also testified that Connelly's illness did not significantly impair his cognitive abilities, and thus he understood his rights when the police advised him that

he need not speak to them. *Connelly*, 479 U.S. at 160-61, 93 L. Ed. 2d at 480, 107 S. Ct. at 518-19.

On the basis of this evidence the Colorado trial court decided that the defendant's statements must be suppressed because they were "involuntary." The court ruled that a confession is admissible only if it is the product of the defendant's rational intellect and free will. Although the court found that the police had not engaged in any coercive activity, Connelly's illness destroyed his volition and compelled him to confess. The trial court also found that Connelly's mental state vitiated his attempted waiver of the right to counsel and the privilege against compulsory self-incrimination. The Colorado Supreme Court affirmed the trial court, finding that the defendant's initial statement was not the product of a rational intellect and a free will, and noting that the absence of police coercion does not foreclose a finding of involuntariness. The court then considered the defendant's attempted waiver of his constitutional rights and found that his mental condition precluded his ability to make a valid waiver. *Connelly*, 479 U.S. at 161-62, 93 L. Ed. 2d at 481, 107 S. Ct. at 519.

The United States Supreme Court reversed, finding that coercive police activity is a necessary predicate to a finding that a confession is not "voluntary" within the meaning of the due process clause. While the mental condition of a defendant may be a significant factor in determining the voluntariness of a confession, it does not "by itself * * * dispose of the inquiry into constitutional 'voluntariness.' " (*Connelly*, 479 U.S. at 164, 93 L. Ed. 2d at 482, 107 S. Ct. at 520.) "Only if we were to establish a brand new constitutional right – the right of a criminal

defendant to confess to his crime only when totally rational and properly motivated -- could respondent's present claim be sustained." *Connelly*, 479 U.S. at 166, 93 L. Ed. 2d at 484, 107 S. Ct. at 521.

The Supreme Court also found that the supreme court of Colorado was mistaken in its analysis of the question of whether the defendant had waived his *Miranda* rights. The Colorado court relied on the testimony of the psychiatrist to the effect that the defendant was not capable of making a free decision with respect to his constitutional right of silence and his constitutional right to confer with a lawyer before talking to the police. The Supreme Court stated that the Colorado court "erred in importing into this area of constitutional law notions of 'free will' that have no place there. There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context." (*Connelly*, 479 U.S. 169-70, 93 L. Ed. 2d at 486, 107 S. Ct. at 523.) The voluntariness of a waiver of the fifth amendment privilege "has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." (*Connelly*, 479 U.S. at 170, 93 L. Ed. 2d at 486, 107 S. Ct at 523.) *Miranda*, stated the Court, "protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes not further than that." *Connelly*, 479 U.S. at 170, 93 L. Ed. 2d at 487, 107 S. Ct. at 524.

The defendant, relying on the following language, argues that *Connelly* does not stand for the proposition that absent police coercion any confession is voluntary.

> "We conclude that the admissibility of this kind of statement is governed by state rules of evidence, rather than by our previous decision regarding coerced confessions and *Miranda* waivers." *Connelly*, 479 U.S. at 159, 93 L. Ed. 2d at 479, 107 S. Ct. at 518.
>
> "We think the Constitution rightly leaves this sort of inquiry [into a criminal defendant's state of mind] to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum * * * and not by the Due Process Clause of the Fourteenth Amendment." *Connelly*, 479 U.S. at 166, 93 L. Ed. 2d at 483, 107 S. Ct. at 522.

Based on the above language, the defendant argues that the States are free to develop their own "voluntariness" standards and therefore the trial court correctly relied on *People v. Berry* (1984), 123 Ill. App. 3d 1042, 463 N.E.2d 1044, in suppressing his confession. The defendant's argument is unpersuasive for two reasons.

First, while it is true that the defendant in *Berry*, who was 17 years old, had an IQ of 80, limited ability to read, write and comprehend, and no prior criminal record, bears a remarkable resemblance to the defendant in the instant case, the *Berry* court did not find those factors to be determinative. The *Berry* court correctly recognized that the test to determine whether a confession is voluntary is whether the defendant's will was overborn at the time of the confession. (*Berry*, 123 Ill. App. 3d at 1044, 463 N.E.2d at 1047, citing *People v. Kincaid* (1981), 87 Ill. 2d 107, 429 N.E.2d 508.) The court further recognized that

the general rule is that subnormal mentality does not in itself make a confession involuntary as long as the defendant has the capacity to understand the meaning and effect of the confession. (*Berry*, 123 Ill. App. 3d at 1045, 463 N.E.2d at 1047.) The court found that the defendant's subnormal mentality, coupled with his young age, lack of education, and complete lack of experience in criminal matters, suggested an increased susceptibility to coercion and intimidation. The court then examined the conduct of the police in obtaining the confession and held it to be involuntary in "light of the intimidating, coercive and deceptive atmosphere of the interrogation." (*Berry*, 123 Ill. App. 3d at 1045, 463 N.E.2d at 1048.) The activities which the court found to be deceptive and coercive included isolating the defendant from his mother, closing the door to the interrogation room and stationing an officer outside, interrogating the defendant about an unrelated offense concerning an acquaintance, and intimating that the defendant's finger prints might have been found at the scene of the crime. Moreover, the police officer who questioned the defendant admitted that he knew of the defendant's impairment of mind, that he did not give him any *Miranda* warnings because he wanted to obtain a confession, and that he told the defendant he was not under arrest in order to avoid *Miranda*. In the instant case, on the other hand, the court explicitly found that the police had not engaged in any type of coercive activity.

Second, the statement by the Supreme Court in *Connelly* that "the Constitution rightly leaves this sort of inquiry [into the state of mind of a criminal defendant

who has confessed] to be resolved by state laws governing the admission of evidence and erects no standard of its own" (*Connelly*, 479 U.S. at 167, 93 L. Ed. 2d at 485, 107 S. Ct. at 522) is not an invitation to State courts to individually define the scope of the protection afforded by the fourteenth amendment. It is merely an acknowledgment that, while in the absence of police coercion the due process clause does not require a confession to be suppressed, the evidentiary rules of a State concerning such matters as the defendant's competency may affect the admissibility of the confession. Based on the above, it is clear that the defendant's confession was "voluntary" within the meaning of the due process clause.

We note with approval, however, that some commentators critical of *Connelly* have urged that State courts, when called upon to apply the provisions of their own constitutions, should not adhere to the Supreme Court's expansive interpretation of voluntariness. (See, *e.g.*, Garcia, *Mental Sanity & Confessions: The Supreme Court's New Version of the Old "Voluntariness" Standard*, 21 Akron L. Rev. 275, 285 (1988) (After *Connelly*, State law is the "last bastion of protection for mentally ill defendants"); Note, *Confessions Compelled by Mental Illness: What's an Insane Person to Do?*, 56 Cin. L. Rev. 1049, 1072 (1988) (*Connelly* "once again places the burden on the states to uphold individual rights").) While our supreme court has recently indicated an increased willingness to construe provisions of the Illinois Constitution differently than similar provisions in the Federal Constitution (see, *e.g.*, *People ex rel. Daley v. Joyce* (1988), 126 Ill. 2d 209, 533 N.E.2d 873), we need not decide whether our constitution

provides broader protection than the Federal Constitution to criminal defendants such as Connelly. We do not base our decision on *Connelly*, which held that police coercion is necessary to render a statement involuntary. Rather, we affirm the suppression of the defendant's confession based on the trial court's finding that the defendant did not knowingly and intelligently waive his fifth amendment rights.

The trial court, in addition to finding the defendant's confession was involuntary, also found that the defendant had not voluntarily waived his fifth amendment *Miranda* rights. The *Miranda* warnings are required, however, only when a defendant is in custody "or otherwise deprived of his freedom of action in any significant way." (*People v. Wipfler* (1977), 68 Ill. 2d 158, 168, 368 N.E.2d 870, 874, quoting *Miranda v. Arizona* (1966) 384 U.S. 436, 444 16 L. Ed. 2d 694, 706, 86 S. Ct. 1602, 1612.) We must therefore determine, as a preliminary matter, whether the defendant's statement in the instant case was the result of a custodial interrogation.

The test used to determine whether a statement was made in a custodial setting is whether a reasonable, innocent person would have believed that he was free to leave or was expressly or impliedly bound to remain in the presence of the police. (*People v. Finklea* (1983), 119 Ill. App. 3d 448, 452, 456 N.E.2d 680, 682; *People v. Savory* (1982), 105 Ill. App. 3d 1023, 1028, 435 N.E.2d 226, 230.) The court must look to all the circumstances surrounding the questioning, with no single factor deemed controlling. The factors to be considered include: (1) the location, time, length, and mood and motive of the interrogation, including the extent of the knowledge possessed by

police; (2) the number of police officers present and the presence or absence of friends or family of the accused; (3) any indicia of formal arrest, including physical restraint, show of weapons or force, booking, fingerprinting, or informing the person he is under arrest; (4) whether the accused arrived at the place of interrogation voluntarily on his own, in response to a police request, or on a verbal command indicating compulsion; (5) whether the accused voluntarily assists police in their investigation; (6) whether the subject is allowed to walk within and from the location of the interrogation unaccompanied by police; and (7) the age, intelligence, and mental make-up of the subject. (*Finklea*, 119 Ill. App. 3d at 452, 456 N.E.2d at 682; *Savory*, 105 Ill. App. 3d at 1028, 435 N.E.2d at 230.) In the instant case we note that the defendant, who was 17 years old, of below normal intelligence, and inexperienced in dealing with the police, was brought to the police station by his father at police request. The defendant was then taken to an office in the basement of the Collinsville police department where, isolated from his father, he was questioned by two experienced detectives. We particularly note that the defendant's father was not allowed to accompany the defendant, but was instead told to remain upstairs. While this factor is not determinative, we believe that it would reasonably suggest to the defendant that he was no longer free to do as he might choose, but was instead subject to the control and commands of the police. (See Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.C.L. Rev. 699, 732 (1974) (Arguing that a person requested to come to the police station "is subject to the same coercive atmosphere and tactics as the person

placed under arrest" and that an "ignorant defendant may see the police request as an order which he cannot refuse, and thus be in custody as effectively as if he were handcuffed").) As Justice Goldenhersh pointed out in his dissent in *People v. Wipfler* (1977), 68 Ill. 2d 158, 175-76, 368 N.E.2d 870, 877 (Goldenhersh, J., dissenting, joined by Dooley, J.):

> "The constitutional rights which *Miranda* was designed to protect are so important that their effective exercise should not depend on the type of judicial hairsplitting present in this and similar cases. The record shows that this 18-year-old defendant was taken to the sergeant's office in the police station, that Detective Kuntz sat at one desk, Detective Mahoney sat at the other, the defendant sat across the desk from Mahoney, and the door to the office was closed. It would be remarkable indeed if under those circumstances an 18-year-old high school student reached any conclusion other than he was in custody and that any attempt to leave would be unsuccessful. Assuming, *arguendo*, that the defendant's belief that he was not free to leave during the questioning was not 'objectively reasonable,' '[i]t has been noted that as a logical matter, a person who honestly but unreasonably believes he is in custody is subject to the same coercive pressures as one whose belief is reasonable; this suggests that such persons also are entitled to warnings. See, *e.g.*, LaFave, "Street Encounters" and the Constitution, 68 Mich. L. Rev. 39, 105 (1968); Smith, The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation, 25 S.C.L. Rev. 699, 711-714 (1974).' *Oregon v. Mathiason*, 429 U.S. 492, 496 n.1, 50 L. Ed. 2d 714, 720 n.1, 97 S. Ct. 711, 714-15 n.1 (Marshall, J. dissenting)."

Although it is a close question, we believe that a reasonable, innocent person would have believed that he was not free to leave. (See *People v. Hagar* (1987), 160 Ill. App. 3d 370, 513 N.E.2d 628 (defendant was questioned in custodial setting where he was brought to office of DCFS investigator by parents and questioned behind closed doors); *People v. Clark* (1980), 84 Ill. App. 3d 637, 405 N.E.2d 1192 (defendant was in custodial situation where friend who had been sitting in squad car with defendant was asked to leave after defendant stated she had shot her husband).) Having concluded that the questioning of defendant occurred in a custodial setting, we now examine the trial court's finding that the defendant's waiver of his *Miranda* rights was invalid.

The trial court found that the defendant had not "voluntarily waived his rights". As explained in *Connelly*, however, police coercion is a necessary predicate of such a finding. Since no such coercion was found here, we are compelled to hold that the defendant's waiver of his *Miranda* rights was voluntary within the meaning of the fifth amendment. An analysis of the validity of a waiver of the defendant's fifth amendment rights, however, does not cease upon a finding of voluntariness.

As Justice Brennan pointed out in his dissent in *Connelly*, there is a second requirement, apart from the voluntariness requirement, that the State must satisfy to establish a waiver of *Miranda* rights. Besides being voluntary, the waiver must be knowing and intelligent. (*Connelly*, 479 U.S. at 187-88, 93 L. Ed. 2d at 498, 107 S. Ct. at 533 (Brennan, J., dissenting, joined by Marshall, J.).) To be knowing and intelligent, "the waiver must have been made with a full awareness both of the nature of the right

being abandoned and the consequences of the decision to abandon it." (*Moran v. Burbine* (1986), 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421, 106 S. Ct. 1135, 1141.) Only if the totality of the circumstances "reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran*, 475 U.S. at 421, 89 L. Ed. 2d at 421, 106 S. Ct. at 1141.) The Illinois Supreme Court has similarly held that a defendant's purported waiver of his *Miranda* rights is ineffective unless it is knowingly and intelligently made (*People v. Smith* (1982), 93 Ill. 2d 179, 185-89, 442 N.E.2d 1325, 1328-29 (no knowing and intelligent waiver of right to counsel during interrogation where police interfered with attorney's effort to consult with defendant); *People v. Turner* (1973), 56 Ill. 2d 201, 205-07, 306 N.E.2d 27, 30-31 (defendant who had history of mental retardation known to police and polygraph operator had not made knowing and intelligent waiver of *Miranda* rights).) As Justice Simon has explained:

> "The distinction between an intellect that is rational and a will that is free must not be blurred. It is possible to have one without the other, but both are necessary for a statement to be voluntary. For example, one operating under insane delusions, as in *Blackburn v. Alabama*, may freely choose, without any external compulsion, to confess participation in a crime in great detail. The defendant may seem to give 'sensible' answers to questioning. But the mental disease afflicting the defendant robs the defendant of any rational choice. Although there is volition, it cannot be said that there is any 'meaningful volition.' Thus, the confession must be suppressed. (*Blackburn v. Alabama* (1960), 361 U.S. 199, 211, 4 L. Ed. 2d 242, 250, 80 S. Ct. 274,

> 282.) On the other hand, a defendant being tortured on the rack or under more modern third-degree methods may be perfectly rational, concise and consistent in confessing. It is even readily believable that a defendant would try to hedge a confession under such pressures, in order to say as little damning as possible while avoiding harsher physical or psychological pain. (See *e.g., Mincey v. Arizona* (1978), 437 U.S. 385, 57 L. Ed. 2d 290, 98 S. Ct. 2408.) But a rational confession of that type lacks free will. It too must be suppressed." *People v. Kincaid* (1981), 87 Ill. 2d 107, 127-28, 429 N.E.2d 508, 517 (Simon, J., dissenting).

In the instant case the court found, based on its observations of the defendant, that the defendant had substantial difficulty in understanding relatively routine questions, and that the defendant was not only limited in his comprehension of single words, but was substantially unable to understand relatively simple concepts. The court also found that the defendant's confession was the product of his subnormal intelligence, his inability to comprehend what his rights were, and his fright of the situation. Furthermore, the court stated that it was convinced from the testimony of the psychologist that the defendant would have agreed to and signed most anything placed in front of him during the interrogation process. We believe that the trial court's findings, if supported by the evidence, are sufficient to conclude that the defendant did not knowingly waive his *Miranda* rights. We therefore consider the State's second argument.

The State next contends that the trial court's decision was against the manifest weight of the evidence. We will not needlessly lengthen this opinion by again repeating

the testimony of the witnesses at the suppression hearing. Suffice it to say that the testimony of the psychologist that the defendant was not capable of understanding certain terms of the *Miranda* rights, and the defendant's own testimony that he did not understand his rights, coupled with the defendant's age, minimal educational level, and lack of experience in criminal matters, are sufficient to support the trial court's decision. The trial court, which had the opportunity to observe the defendant during his testimony, clearly was in a position superior to a court of review to determine the defendant's mental abilities.

We are aware, of course, that evidence of limited intellectual capacity, standing alone, does not indicate that a defendant is incapable of waiving his constitutional rights, (*People v. Murphy* (1978), 72 Ill. 2d 421, 437, 381 N.E.2d 677, 685) nor are the police required, as a prerequisite to accepting a waiver, to conduct a mental examination of the accused to ascertain his ability to comprehend his rights (*People v. Cooper* (1975), 30 Ill. App. 3d 326, 332, 332 N.E.2d 453, 458, *cert. denied* (1976), 425 U.S. 994, 48 L. Ed. 2d 818, 96 S. Ct. 2206.) Mental deficiency is, however, an important factor in considering the totality of the circumstances under which a purported waiver of rights was made since the "purpose of advising an accused of his rights is to enable him to make an intelligent decision, and to understand the consequences of that decision, and the fact that the advice was iterated and reiterated, and that he said he understood it, is of little consequence unless the defendant was possessed of the intelligence to understand the admonition." *People v. Turner* (1973), 56 Ill. 2d 201, 205, 306 N.E.2d 27, 30.

In support of its position, the State cites numerous cases where a defendant's confession has been held to be admissible despite the defendant's low mental capabilities. (*E.g.*, *People v. Madden* (1986), 148 Ill. App. 3d 988, 501 N.E.2d 1297 (defendant had an IQ of 82 and was under the influence of drugs); *People v. Kokoraleis* (1986), 149 Ill. App. 3d 1000, 501 N.E.2d 207 (defendant had an IQ of 75 and dropped out of school after the eighth grade); *People v. Ellison* (1984), 126 Ill. App. 3d 95, 466 N.E.2d 1024 (defendant had an IQ of 77, was borderline mentally retarded, and had a verbal language disability); *People v. Hester* (1968), 39 Ill. 2d 489, 237 N.E.2d 466 (defendant was 14, had an IQ of 82 and a mental age of nine years, nine months), *cert. dismissed* (1970), 397 U.S. 660, 25 L. Ed. 2d 642, 90 S. Ct. 1408; *People v. Clements* (1985), 135 Ill. App. 3d 1001, 482 N.E.2d 675 (defendant was 16, had a [sic] IQ of 58, and was mildly retarded and passive dependent), *cert. denied* (1986), 476 U.S. 1106, 90 L. Ed. 2d 361, 106 S. Ct. 1952.) These decisions can offer little support for the State's position, however, since the validity of a waiver of rights is essentially a question of fact. "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (*People v. Turner* (1973), 56 Ill. 2d 201, 205-06, 306 N.E.2d 27, 30, quoting *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 1023; see also *People v. Redmon* (1984), 127 Ill. App. 3d 342, 347, 468 N.E.2d 1310, 1314; *People v. Perez* (1983), 113 Ill. App. 3d 143, 147, 446 N.E.2d 1229, 1233.) The court in the instant case, after considering all

of the evidence and testimony presented, concluded that the defendant's confession was the product of his "subnormal intelligence, his inability to comprehend what his rights were, and his fright of the situation." Such a conclusion was not contrary to the manifest weight of the evidence.

The State's final contention is that the trial court erred by applying the incorrect standard in determining whether the defendant's confession should be suppressed. In its written order, the court found that the defendant "was barely a 17 year old adolescent with subnormal intelligence, with little education, dependent fully upon his parents, and lacking in experience in criminal affairs completely." The court went on to state:

> "When confronted with such a situation, [the court] feels that it is the obligation of the court to make sure that the greatest of care was taken to assure that the Confession was voluntary and, further, that the Confession was not a product of ignorance of rights or of adolescent fantasy, fright or despair. (*In re Gault* and *People v. Simmons*)."

Based on the above language, and on the trial court's citation to *Gault* and *Simmons*, both cases involving juvenile defendants, the State argues that the trial court incorrectly applied the "juvenile standard" to this adult defendant. The State contends that the references to "the greatest of care" and to "adolescent fantasy, fright or despair" are only applicable to juveniles and the court therefore erred in basing its suppression of the defendant's confession on adolescent fright or on any "particularly great scrutiny."

The State seeks, in effect, to have this court remand this case to the trial court for a new suppression hearing with directions that the court use less care and be less rigorous in its scrutiny of the defendant's ability to understand and knowingly waive his constitutional rights. We flatly reject such a suggestion. The trial court found that the defendant was unable to comprehend his rights. We fail to see how applying a different "standard" would change that determination. We hold, therefore, that any error which the trial court may have committed in this regard was harmless.

For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

Affirmed.

HOWERTON and GOLDENHERSH, JJ., concur.